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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 782

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, INTERNATIONAL, AFL-CIO, *Petitioner*,

v.

TRANS WORLD AIRLINES, INC., *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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1. The parties have never agreed upon the scope of the certification of representatives issued by the National Mediation Board. The statement in the Brief in Opposition, p. 2, that they have so agreed is based on the recitation in the recognition clause in the collective bargaining agreements between the parties of the ad-

mitted fact that the Association has been certified to represent nationals or residents of the United States. But nowhere in this recognition clause or elsewhere has the Association ever agreed that these were the only persons it was certified to represent. The certification of the National Mediation Board finds that the Association is authorized to represent "Flight Stewards and Hostesses employed by" TWA (R. 10). There is no limitation stated as to nationality, place of residence, place of flight, or otherwise. The Association has at all times insisted that under this certification it was entitled to recognition for all flight stewards and hostesses whatever their nationality, wherever based and wherever they flew (R. 49, 53). The agreements which limit the recognition which TWA has been willing to accord the Association to nationals or residents of the United States establish only the fact that the Association has been unable to convince TWA that it should accord recognition to the Association for members of the craft or class who are foreign nationals based abroad (R. 49).

Nor have the Association's collective bargaining agreements with TWA been limited to transportation which takes place within the United States. The currently effective agreement contains numerous provisions by their terms applicable to American nationals based abroad and flying abroad (R. 45-47).

2. The National Mediation Board has never ruled that the Railway Labor Act does not apply to foreign nationals residing abroad who serve as members of the crew of an American flag airplane, but rather has declined to do so on the ground that this is a matter for decision by the courts instead of the Board (R. 51-53, 59). The case of *Air Line Dispatchers Association* v.

National Mediation Board, 189 F. 2d 685 (D.C. Cir.), cert. den., 342 U.S. 849 (1951), is relied upon in the Brief in Opposition, p. 4, as the applicable administrative ruling. However, no issue was there presented as to the applicability of the Railway Labor Act to employees performing all their work on board an American flag plane. There the Air Line Dispatchers Association had applied to the National Mediation Board for certification as the representative of flight dispatchers of a company which conducted no operations in the United States. The flight dispatchers performed their work entirely upon foreign soil, were not members of the crew of any airplane and did not perform any of their work upon or within any airplane. In these circumstances the National Mediation Board considered the Railway Labor Act inapplicable and dismissed the petition. The United States Court of Appeals for the District of Columbia Circuit upheld the National Mediation Board's dismissal as proper, saying (at pp. 687, 690):

> "The Company operates and the dispatchers are employed solely outside the continental limits of the United States.
>
> * * *
>
> "Turning to the merits of the decision made by the Board, we agree that the Act does not extend to an air carrier, and its employees located entirely outside the continental United States and its territories."

It is true that both the National Mediation Board and the Court of Appeals in the *Air Line Dispatchers* case did state that the Railway Labor Act is limited in its application to the physical boundaries of the United States. The case, however, did not present, and

no consideration was given to, the issue of the applicability of the Act to crews performing all their services on board American flag airplanes. We believe the opinion in the *Air Line Dispatchers* case must be strictly limited to the facts of that case.

Except for the *Air Line Dispatchers* case we know of no instance in which the National Mediation Board has ever applied the doctrine enunciated by the courts below, that the Railway Labor Act has no application beyond the physical boundaries of the United States. The National Mediation Board has uniformly refused to apply rail coverage standards to airlines. *Matter of Representation of Northwest Airlines, Inc.—Mechanical Department Foremen*, 1948, 2 N.M.B. 19, 24-26. Various instances in which the National Mediation Board has applied the Railway Labor Act to disputes outside the physical boundaries of the United States are set forth in National Mediation Board, 16th Annual Report, p. 53; 17th Annual Report, pp. 14-15; 18th Annual Report, p. 44; 19th Annual Report, pp. 43-44.

3. Congress in enacting the Federal Aviation Act of 1958 did not indicate an intention that the Railway Labor Act should not be applied outside the continental boundaries of the United States. An examination of the pertinent legislative history shows that the Brief in Opposition, p. 4, omits relevant reports in drawing the opposite conclusion. In the House Report (H. Rept. 2360, 85th Cong., 2d Sess., pp. 10-11), in the debate on the floor of Congress (104 Cong. Rec. 16086), and in the Conference Report (H. Rept. 2556, 85th Cong., 2d Sess., p. 90), Congress expressed unequivocally that its reenactment without change of provisions of the Civil Aeronautics Act of 1938 was not to be used by courts as indicating any Congressional in-

tent as to the meaning thereof. Thus, the Conference Report states (p. 90):

> "*Effect of reenactment of provisions of present law.* The committee of conference wishes to make it clear that it endorses, as expressing the intention of the managers on the part of the Senate and the managers on the part of the House, the statements in the House debate, and the House committee report to the effect that Congress does not intend that this reenactment of the Civil Aeronautics Act of 1938 shall constitute legislative adoption of administrative interpretations and practices or of judicial decisions under that act. It is important that there be no doubts on this point, particularly in view of the many legal controversies over the interpretation of the provisions of title IV. * * *
>
> "As stated in the report of the House Committee on this legislation, therefore, the reenactment of provisions now in effect is to be regarded as a completely neutral factor in any question arising hereafter as to the interpretation of the present law or of this new legislation."

Title IV of the Civil Aeronautics Act of 1938, to which the above quotation specifically refers, contained in Section 401 (l) (4) the requirement of compliance with the Air Carrier Amendment to the Railway Labor Act as a condition of every certificate of public convenience and necessity, and in this respect was reenacted without change in the Federal Aviation Act of 1958 (Section 401 (k) (4), 49 U.S.C.A. Supp. 1371 (k) (4)).

Nor are the proceedings in the 83rd Congress relied upon in Brief in Opposition (pp. 4-7) any part of the legislative history of the Federal Aviation Act of 1958. While the Senate Report (S. Rept. 1811, 85th Cong.,

2d Sess., p. 7) and the House Report (H. Rept. 2360, 85th Cong., 2d Sess., pp. 2-3) on the bill which became the Federal Aviation Act of 1958, list certain bills and hearings in earlier Congresses as part of the consideration by Congress of the problem posed by the mid-air collisions in 1958, which necessitated the hurried adoption of a unified aviation system which included control of military as well as civil flights, none of the bills, reports and studies cited in the Brief in Opposion (pp. 5, 7) are mentioned in these reports.

S. 2647, 83rd Cong., 2d Sess., which is the bill cited in the Brief in Opposition (pp. 4-5), contained only one provision to amend the Railway Labor Act, namely, Section 1201 (b) (1), which read as follow:

> "(1) Section 201 of the Railway Labor Act (U.S.C. 1940 edition, title 45, sec. 181), by amending such section to read as follows:
>
> "Section 201. All the provisions of Title I of this Act, except the provisions of Section 3 thereof, are extended to, and shall cover, every air carrier and air contractor, as those terms are defined in the Civil Aeronautics Act of 1944, and every person (including, but not by way of limitation, corporations, joint-stock associations, partnerships and unincorporated associations) which is directly or indirectly owned or controlled by one or more such carriers or contractors, including any receiver, trustee or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of such carrier, air contractor, or other person, and every person who performs any work as an employee or subordinate official of such carrier, such subcontractor, or such other person, and is subject to its continuing authority to supervise and direct the manner of rendition of his service, whether or not such work is in connection with air transporta-

tion or air commerce. The definition of the term 'employee' set forth in Section 1 of this Act shall not be applicable to this title."

The foregoing is the only language in S. 2647, 83rd Cong., 2d Sess., relating in any way to the issues here involved. That a committee of one of the branches of Congress did not approve this provision seems of no relevance.

Nor is there any thing in the quoted Aviation Study made in the 83rd Congress (Br. in Opp. pp. 5-7) directed to personnel working on American flag planes, as to whom American law would seem obviously applicable without any issue of extraterritoriality arising. Furthermore what certain Congressmen in 1955 think a law enacted in 1938 means cannot be considered its "legislative history." *New York* v. *Saper*, 336 U.S. 328, 339, 340; *Guessefeld* v. *McGrath*, 342 U.S. 308, 317; *Wong Yong Sung* v. *McGrath*, 339 U.S. 33, 47.

4. The intent of Congress in making compliance with the Railway Labor Act a condition of all certificates of convenience and necessity was to assure that certificates authorizing operations outside the United States would not be used to undercut standards for American employees through employment of foreigners on other than union terms. The Brief in Opposition, p. 12, argues that the requirement of compliance with the Railway Labor Act by airlines in their foreign operations was designed to protect American personnel, hence it should be construed as not covering employees of foreign nationality. But only by covering employees of American airlines who are of foreign nationality can employees of American nationality be protected

Otherwise the American employee suffers the competition of employees working in the same craft or class at non-union wages and hours (see Petition for Certiorari, pp. 8-11).

Indeed, the plea which moved Congress to make compliance with the Railway Labor Act a condition of each certificate of convenience and necessity began with a statement that the Air Line Pilots' Association had foreign pilots as members and needed this legislation in order to have an effective sanction to use in enforcing observance of the Railway Labor Act outside the physical boundaries of the United States (see hearings quoted Petition for Certiorari, pp. 12-13).

5. The limitation to pilots and co-pilots of the minimum wage provisions applicable in overseas or foreign air transportation set forth in Paragraph 2 of subsection h of Section 401 of the Federal Aviation Act of 1958, affords no basis to assume an intent to protect collective bargaining abroad for pilots and co-pilots but not for other employees. The Brief in Opposition, pp. 12-13, overlooks that the obvious reason the minimum wage provision was limited to pilots and co-pilots was that Congress was adopting the wage provisions of Decision 83 of the National Labor Board as a minimum but that case was concerned only with pilots and co-pilots. (See *Matter of The Air Line Pilots' Wage Dispute*, II N.L.B. 20, decided May 10, 1934.) There had never been any analogous governmental determination of wage standards for hostesses or airline employees other than pilots and co-pilots although Congress in Section 13 of the Air Mail Service Act of 1934 and amendments thereto, named the National Labor Board or its successor in authority as the agency to fix wage

rates for all other employees of airlines as well as for pilots. 48 Stat. 933, 49 Stat. 614.

6. There is nothing in the Railway Labor Act which expressly or impliedly limits its application to the continental United States and its territories. In arguing that the words "in the same manner and to the same extent" appearing in Section 202 of the Railway Labor Act are effective to exclude employees involved in operations of airlines outside the United States (Brief in Opposition, pp. 8-9), TWA not only takes the words out of context but assumes that the Railway Labor Act has some built in limitation to the continental United States. The Air Carrier Amendment does not provide that air carriers and their employees shall be covered in the same manner and to the same extent as railroad employees. It provides that "every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail or under contract with the United States Government and every air pilot or other person who performs any work as an employee" shall be covered "in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of 'carrier' and 'employee' respectively in section 1."

In other words, all air carriers and all employees are to be added to the group already covered. Since there is not a single word in the Railway Labor Act itself that expressly or impliedly limits the Act to application within the United States, there is no reason the all inclusive language of "every" carrier engaged in "foreign commerce" and "every pilot or other person" employed thereby, should not be given its plain and unambiguous meaning. The only way any limitation to transportation within the United States can be dragged

in, is by reference to the Interstate Commerce Act which is used in defining the rail carriers to be covered. But the Air Carrier Amendment expressly excludes such a limitation on air carriers and their employees when it provides that the group of air carriers and their employees described in Section 201 is to be added to those covered without straining them through the definition applicable to rail carriers and their employees.

7. The doctrine of nationality of aircraft adopted in the Chicago Convention on International Civil Aviation of 1944 (61 Stat. 1185), in other treaties and in Section 501 of the Federal Aviation Act of 1958 (72 Stat. 737) entitles each nation to apply its own laws to govern the internal economy of its aircraft. The authorities, including all those cited in the Brief in Opposition, p. 11, are in complete agreement that today the "nationality of aircraft is as incontestable as that of ships." J. P. Honig, The Legal Status of Aircraft, The Hague, Martinus Nijhoff (1956), p. 191. It is also agreed that the concept of nationality of aircraft is the same as that of ships. "In public international law the nationality of vessels and the nationality of aircraft indicate the responsibility of the flag State to other States for the conduct of the vessel or aircraft in question and the right of such vessel or aircraft to international protection by such state." John C. Cooper, National Status of Aircraft, 17 J. Air Law 292, 300 (Summer, 1950). The law of the flag is an integral part of the concept of nationality of a vessel or aircraft. "In view of this close relationship between a vessel and the nation whose flag it flies, that nation may take jurisdiction over an act occurring on the vessel." Rear Admiral Chester Ward, U.S.N., Projecting the

Law of the Sea into the Law of Space, J.A.G. Journal, March 1957, p. 3. While many authors express the need for treaties defining the extent to which the various aspects of the law of the flag as developed with respect to sea going vessels apply to aircraft, there is no dissent from the proposition that as a necessary corrollary of granting aircraft nationality, the doctrine of the law of the flag is applicable to govern the qualifications and conditions of employment of all persons serving on the aircraft. See authorities cited Petition for Certiorari, p. 20.

The Geneva Convention on the High Seas, signed by the United States on September 15, 1958, reprinted 52 Am. Journal of International Law 842 (October 1958), includes aircraft along with ships in its provisions dealing with piracy, Articles 15-22, inclusive, *ibid*, pp. 846-847. This convention for the first time made express the provision of nationality for ships already present for aircraft in the Chicago Convention on Civil Aviation. Thus Article 5 of the Geneva Convention provides "Ships have the nationality of the state whose flag they are entitled to fly." In addition Article 5 of the Geneva Convention provides: "There must exist a genuine link between the state and the ship; in particular the state must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag" (*ibid*, p. 843).

The provision in the Chicago Convention that each state has sovereignty over the air space above its territory, set forth in the Brief in Opposition, p. 11, in no way militates against the application of the doctrine of the law of the flag to the internal economy of the ship. This Court, as well as the authorities generally, recognizes the exclusive sovereignty of each nation over

its harbors and coastal waters within the three mile limit; but this has never been deemed inconsistent with the application of the law of the flag when the ship was within those areas. *United States* v. *Flores*, 1933, 289 U.S. 137, 155-156.

There is no principle of international law which militates against giving the Air Carrier Amendment to the Railway Labor Act its literal and plain meaning, namely, that it applies to all employees of American air carriers, no matter what their nationality, place of residence, or place of flight. Rather, principles of international law, recognize that the United States is the only power that can effectively govern the internal economy of its flag airplanes. Unless the Railway Labor Act applies, employment relations on board aircraft flying beyond our national boundaries will be governed by the common law, which Congress obviously meant to displace by either the National Labor Relations Act or the Railway Labor Act in all private employment subject to federal jurisdiction.

This Court should decide the important issue presented by this petition.

Respectfully submitted,

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